IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 12TH DECEMBER 2007 / 21ST AGRAHAYANA 1929

SA.No. 551 of 1994()

AS.143/1993 of PRL.SUB COURT,THALASSERY
OS.623/1992 of PRL.MUNSIFF COURT, KANNUR
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APPELLANTS/ DEFENDANTS 4 TO 9
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1. **NAYYAN AMMAL;U, W/O. KUDUVAN KRISHNAN,**
   KUDUVAN HOUSE, KADALAYITHERU,
   CHIRAKKAL AMSOM AND DESOM,
   P.O. CHIRAKKAL KANNUR DT.

2. **PRAKASHAN, S/O. KUDUVAN KRISHNAN, DO. DO.**

3. **PRABHA, D/O. DO. DO.**

4. **PRASANTH, S/O. DO. DO.**

5. **PRASEETHA, D/O. DO. DO.**

6. **PRAMEELA, D/O. DO. DO.**

BY ADV. SRI.V.R.VENKATAKRISHNAN (SR.)

RESPONDENTS/ PLAINTIFF AND DEFENDANTS 1 TO 3 & 10 TO 14
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1. **KUDUVAN AMMALU, D/O.**
   LAKSHMI AMMA, P.P-1-67
   PALLIKKUNNU AMSOM & DESOM
   KANNUR DISTRICT.

2. **KUDUVAN MEENAKSHI, D/O. DO.**
   KADALAYITHERU, CHIRAKKAL AMSOM
   AND DESOM, KANNUR.

3. **KUDUVAN GOVINDAN, S/O. DO. DO.**

S.A. NO.551/1994

***4. KUDUVAN SEKHARAN, S/O. DO. DO. (DIED)**

5. THATTAYOTT LAKSHMI,
W/O. NARAYANAN, DO. DO.

6. RAJAN, S/O. THATTAYOTT,
LAKSHMI DO. DO.

7. GEETHA, D/O. DO. DO.

8. SREEKUMAR, S/O. DO. DO.

9. SUNILKUMAR, S/O. DO. DO.

***ADDL. R10 TO R14 ARE IMPLEADED.**

10. C.SHYAMALA, AGED 45 YEARS,
W/O. KUDUVAN SEKHARAN, RESIDING
AT KUDUVAN HOUSE, KADALAYITHERUP.O.,
CHIRAKKAL KANNUR.

11. K.BINDHU, AGED 27 YEARS,
D/O. KUDUVAN SEKHARAN, DO. DO.

12. K.SINDHU, AGED 25 YEARS, DO. DO.

13. K.BEENA, AGED 23 YEARS, DO. DO.

14. K.SEENA, AGED 20 YEARS, DO. DO.

IT IS RECORDED THAT 4TH RESPONDENT DIED AND THE LEGAL REPRESENTATIVES OF DECEASED 4TH RESPONDENTS ARE IMPLEADED AS ADDITIONAL RESPONDENTS 10 TO 14 AS PER ORDER DT. 27.6.03 IN IA. 86/03.

BY ADV. SRI.E.V.NAYANAR
SMT.VIDHYA. A.C

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12/12/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SA. NO.551/1994

ORDER ON CMP. NO.1078/1994 IN SA. 551/1994

DISMISSED

12.12.2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

tss

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 551 OF 1994

.....

DATED THIS THE 12th DAY OF DECEMBER, 2007

JUDGMENT

Defendants 4 to 9 in O.S.623 of 1993 on the file of Munsiff Court, Kannur are the appellants. First respondent is the plaintiff and other respondents, other defendants. Plaint schedule property admittedly originally belonged to Lakshmi. Plaintiff, defendants 1 to 3, Krishnan, husband of 4th defendant and deceased Narayanan, husband of 10th defendant are her children. Defendants 5 to 9 are the children of 4th defendant and defendants 11 and 12 are the children of 10th defendant. First respondent instituted the suit seeking a decree for partition and allotment of her share contending that on the death of Lakshmi, it devolved on all the children and properties are to be divided between the legal heirs. Defendants 1, 2, 3 and 10 to 14 filed written statements admitting the plaint claim and seeking their share. Appellants filed a written statement admitting the devolution of right but contending that Lakshmi had executed Ext.B1 will on 31.1.1978 whereunder she bequeathed her rights over ten cents of the property surrounding the tharawad house in favour of husband of first appellant and therefore that portion

of the property is not available for partition and only the remaining property is available for partition. It was contended that at the time when the properties are to be divided, the said ten cents is to be set apart to the share of appellants as it is not available for partition.

2. Learned Munsiff, on the evidence of PW1, Dws 1 to 3, Exts.A1 to A6 and B1 to B20, passed a preliminary decree holding that on the death of Lakshmi, her rights devolved on her children and appellants are not entitled to claim right under Ext.B1 will as it was not proved to be the last will of deceased Lakshmi. The properties were directed to be divided into six equal shares and allotment of one share each to the plaintiff and defendants 1 to 3 and one share together to defendants 4 to 9 and one share together to defendants 10 to 14. Appellants challenged the judgment before Sub Court, Thalassery in A.S.143 of 1993. Learned Sub Judge, on reappreciation of evidence, confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Second appeal was admitted formulating the following substantial questions of law.

1)Was the first appellate court justified in finding that the will is not true and genuine when it confirmed the findings of the trial court that in legal terms the will is actually proved.

2)One of the attestors having been examined and having fulfilled the provisions of Section 68 of the Indian Evidence Act, was the courts below justified in finding against the will.

4. Learned senior counsel appearing for appellants and learned counsel appearing for first respondent were heard.

5. The argument of the learned senior counsel is that trial court has specifically found that " in legal terms the will is actually proved" and as vitiating circumstance was pleaded or proved, trial court was not justified in not upholding the will and first appellate court was not justified in confirming the finding of the trial court on the validity of Ext.B1 will.

6. Relying on the Division Bench decision of this court in Thayyullathil Kunhikannan V. Thayyullathil Kalliani(AIR 1990 Kerala 226), learned senior counsel argued that necessity to prove execution of the will arises only if execution of the will is denied and even after filing of the written statement whereunder appellants claimed right under Ext.B1 will, first respondent did

not file a replication or amended the plaint denying the execution of the will and in such circumstances, there is no necessity to even formally prove the will. It was also argued that the evidence of DW1, one of the attesting witnesses to Ext.B1 proved the execution, which was accepted by trial court and no vitiating circumstance was pointed out and therefore courts below were not justified in ignoring Ext.B1 will or not upholding the disposition of the property by the testator as provided under Ext.B1. Relying on the decision of Apex Court in Savithri V. Karthyayani Amma (2007(4) KLT 811(SC), it was argued that by proving the execution of the will, appellants have discharged their burden and neither first respondent plaintiff nor supporting defendants have a case that the deceased testator was not having a sound disposing state of mind and no suspicious circumstance was brought out at the time of evidence and therefore courts below should have found that ten cents bequeathed to deceased husband of first appellant under Ext.B1 is not available for partition. Learned senior counsel, relying on the Commentary on Law of Evidence by Ameer Ali, 14th Edition argued that the burden is discharged by proof of sound

disposing state of testator's mind and the signature in Ext.B1 will and by the evidence of DW1 it is satisfied and the other defendants or the plaintiff did not establish any vitiating circumstance and therefore courts below were should have upheld the will. Learned senior counsel also relied on the Division Bench decision of this court in Joseph V. Ippunny (2007 (4) KLT 853) and argued that obligation of the propounder is only to examine at least one of the attesting witnesses, if he is alive, to prove that the will was executed as per law and by the evidence of DW1 that is satisfied and as the propounder has discharged the burden and no suspicious circumstance pointed out, there was no justification for not upholding Ext.B1 will especially in the light of the finding of the trial court that execution of the will is proved.

7. Learned counsel appearing for respondents argued that existence of Ext.B1 will was disclosed for the first time in the written statement and even though there was a mediation whereunder 4th appellant was also a signatory, evidenced by Ext.B18, existence of the will was not disclosed and that fact itself is sufficient to discard the will. It was also argued that by

the evidence of DW1, testamentary capacity of the testator was not established and there is no evidence to prove that Ext.B1 will was executed by deceased Lakshmi out of her own free will and volition and on a sound disposing mind and therefore by the evidence of DW1, execution of Ext.B1 will was not proved and courts below rightly found that Ext.B1 will was not executed by deceased testator. Learned counsel also argued that if the will was genuine, existence of the will would have at least been disclosed. There was a mediation and at least when a lawyer notice was sent by first respondent seeking partition and in the normal human conduct, if there exist a will, that would have been disclosed and courts below rightly appreciated the evidence and found that Ext.B1 will is not proved as the will voluntarily executed by deceased Lakshmi and so found by courts the entire property is available for partition.

8. Ext.B1 will was disclosed by appellants for the first time when they stated about it in the written statement. Admittedly, there was a mediation after the death of Lakshmi and settlement was arruved at though first respondent was not a party to it and hence binding on her. It is admitted case that 4th appellant, son

of Krishnan, under whom appellants claim right under Ext.B1 will, was one of the executants. Though it was suggested to Dws 2 and 3 that existence of the will was disclosed at the time of mediation, Ext.B18 does not show the existence of the will was disclosed. Ext.B18 shows that settlement was not based on any will. DW3, the mediator who was examined to prove the mediation deposed that existence of the will was not at all disclosed at the time of mediation. When a notice was sent by first respondent demanding partition, contending that on the death of Lakshmi, her right over the plaint schedule property devolved on all the legal heirs, no reply was sent by appellants contending that Lakshmi had executed Ext.B1 will and therefore ten cents which was bequeathed to Krishnan under Ext.B1 was not available for partition. In such circumstances, first respondent had no occasion to plead about the will in the plaint. Code of Civil Procedure does not mandate that a plaintiff is to file a replication denying the allegations raised in the written statement, even if they relate to the execution of a will. Therefore for the failure of first respondent either to file a replication or an application for amendment of the plaint with

regard to the non-execution of Ext.B1 will, it cannot be said that execution of Ext.B1 will was admitted. Therefore, relying on the Division Bench decision of this court in Thayyullathil Kunhikannan's case (supra), it is not possible to hold that the will is to be accepted and appellants have no burden to establish execution of the will.

9. The question is whether Ext.B1 will is proved to be the last will executed by deceased Lakshmi. The Constitution Bench of Supreme Court in T.L.Venkatachala Iyengar V. Thimmajamma (AIR 1959 SC 443) settled the legal position long back. The important feature which distinguishes wills from other documents is that the will speaks from the death of the testator and when it is propounded or produced before the court the testator who has already departed the world cannot come and say whether it is his will or not. That aspect is to be decided by the court and naturally it introduces an element of solemnity in the decision of the court on the question as to whether the document so propounded is proved to be the last will and testament of the departed testator. It is for the propounder to adduce satisfactory evidence that the will was signed by the

testator, the testator was, at the relevant time, in a sound and disposing state of mind, that he understood the effect and nature of disposition and he put his signature to the document of his own free will. Ordinarily, when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind, and his signature as required by law, courts would be justified in making a finding in favour of the propounder. The onus on the propounder can be taken to be discharged as proof of these essential facts.

10. In Savithri's case (supra), Supreme Court laid the legal requirements of proof of will. The legal requirements in terms of the provisions of Section 63 of Succession Act and Section 68 of Evidence Act are now well settled. A will like any other document is to be proved in terms of the provisions of Indian Succession Act and Indian Evidence Act. The onus of proving the will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the will by a testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the

execution of the will. It is required to be shown that will has been signed by the testator with his free will and that at the relevant time he was in a sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the will in the presence of two witnesses, who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it could be accepted as genuine.

11. In Venkatamuni V. C.J.Ayodhya Ram Singh(AIR 2007 (4)SC 311), this question was again examined. Analysing the earlier decisions, it was held that proof of a will shall strictly be in terms of Section 63 of Indian Succession Act and their Lordships then held: " It is further well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made".

12. Following the decision in Surendrapal V. Saraswati Arora (AIR 1974 SC 1999) and T.L.Venkatachala Iyengar's case (supra) and Smt.Guro V. Atma Singh and others (1992(2)SCR

30), Daulat Ram and others V. Sodha and others (2005(1) SCC 40) and Meenakshiammal V. Chandrasekaran & Another (2005 (1)SCC 280), it was held that it is for the propounder to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of dispositions; that he put the signature to the testament of his own free will and that he has signed it in the presence of two witnesses who attested it in his presence and in the presence of each other and once these elements are established, the onus which rests on the propounder is discharged. There may be cases in which execution of the will itself is surrounded by suspicious circumstances such as the condition of the testator's mind may be feeble or debilitated or whereunder in the light of relevant circumstances, dispositions appear to be unnatural, improbable or unfair or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and volition. In all such circumstances, where there may be legitimate suspicious circumstances, those must be reviewed and satisfactorily explained before the will is accepted. Again in

cases whereunder the propounder has himself taken a prominent part in the execution of the will, which confers on him substantial benefit that is itself one of the suspicious circumstance which he must remove by clear and satisfactory evidence.

13. The question in this case is whether appellants who claim rights under Ext.B1 will discharged the burden of proving Ext.B1. It is for them to prove that Lakshmi, the testator signed the will; that he was at the relevant time in a sound disposing state of mind; that she understood the nature and effect of the dispositions; that she put her signature to the testament of her own free will and that she has signed it in the presence of two witnesses who attested it in her presence and in the presence of each other. The only evidence adduced to prove the will is that of DW1, the attesting witness. None of the appellants were examined. Though evidence of DW1, the attesting witness was that DW1 happened to be an attesting witness at the instance of Krishnan, the legatee who derived the benefit under Ext.B1 will, the question is whether evidence of DW1, establish that, at the time of execution of Ext.B1 will, testator Lakshmi was in a sound

disposing state of mind and that she understood the nature and effect of dispositions made under Ext.B1. DW1 did not depose anything on these vital and relevant facts. The argument of the learned senior counsel is that there is no case for plaintiff or other defendants that deceased Lakshmi was not in a sound disposing state of mind or that when Ext.B1 will was executed she did not understand the nature and effect of the dispositions. The burden to prove the sound disposing state of mind is on the appellants as it is appellants who relied on Ext.B1 will. Therefore it is for them to prove that when Ext.B1 will was executed, testator Lakshmi was having a sound disposing state of mind and she understood the nature and effect of the dispositions. In the absence of any evidence on those facts, it can only be held that appellants did not establish two of the most essential ingredients necessary to uphold a will viz, sound disposing state of mind of the testator and that testator executed the will after understanding the nature and effect of the dispositions.

14. On going through the evidence of DW1(even if evidence of DW1 is believed), it is not possible to hold that

Lakshmi understood the nature and effect of the dispositions, when she signed the document or that she was having a sound disposing state of mind at that time. At least a formal proof of sound disposing state of mind is necessary for upholding the will. There is no evidence to prove it. On the evidence, courts below rightly found that Ext.B1 will was not proved to be the will executed by deceased Lakshmi out of her free will and volition and that too in a sound disposing state of mind. Hence finding of the courts below that plaint schedule property is available for partition is perfectly correct. There is no merit in the appeal. Hence appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

S.A.551/1994

JUDGMENT

12.12.2007